Supreme Court, U.S.
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No. 09-938

IN THE
Supreme Court of the United States

D. CLARK OGLE, LIQUIDATING TRUSTEE
OF THE AGWAY LIQUIDATING TRUST,
Petitioner,

v.

FIDELITY & DEPOSIT COMPANY OF MARYLAND,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

CHARLES G. COLE
Counsel of Record
FILIBERTO AGUSTI
LINDA C. BAILEY
STEPTOE & JOHNSON LLP
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-6270
ccole@steptoe.com

Attorneys for Respondent Fidelity & Deposit Co. of Maryland

MARCH 26, 2010

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether, in light of *Travelers Casualty & Surety Co. v. PG&E*, 549 U.S. 443 (2007), a general unsecured claim for post-petition attorneys' fees must be allowed in bankruptcy when authorized by a valid prepetition contract and not expressly excluded under 11 U.S.C. § 502 (2006).

RULE 29.6 STATEMENT

Respondent Fidelity & Deposit of Maryland ("F&D") is wholly owned by Zurich American Insurance Company ("ZAIC"), a property and casualty insurance company domiciled in New York. ZAIC is a wholly owned subsidiary of Zurich Holding Company of America, a Delaware Holding Company. Its ultimate parent is Zurich Financial Services, Ltd. ("ZFS"). ZFS is a publicly traded Swiss holding company. There is no publicly held company that owns 10% or more of ZFS's stock.

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Fidelity & Deposit Company of Maryland ("F&D") respectfully opposes the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

STATEMENT OF THE CASE

This case presents a question of bankruptcy law—whether an unsecured creditor's claim for post-petition attorneys' fees is allowable—that the courts of appeals have consistently and adequately addressed based on the comprehensive framework this Court provided in *Travelers Casualty & Surety Co. v. PG&E*, 549 U.S. 443 (2007) ("*Travelers*").

I. F&D'S ENFORCEABLE CLAIM FOR ATTORNEYS' FEES

This case arises from a prepetition agreement between Agway, Inc. ("Agway") and F&D. Pursuant to the agreement, F&D provided surety bonds on behalf of Agway to its insurers. In return, Agway agreed to indemnify F&D for payments it made under the bonds as well as expenses F&D incurred enforcing its rights under the agreement, including attorneys' fees.

Agway declared bankruptcy under Chapter 11. As a result, F&D paid millions of dollars under its bonds and continues to incur substantial attorneys' fees enforcing its indemnity rights against Agway. Petitioner, trustee of the Agway Liquidating Trust, concedes both the validity and enforceability of the prepetition agreement and the reasonableness of the attorneys' fees. Nonetheless, Petitioner refuses to allow F&D an unsecured claim in the bankruptcy for its expenses based on the contention that the Bankruptcy Code does not permit an unsecured

creditor, such as F&D, to recover attorneys' fees incurred post-petition.

The bankruptcy court rejected Petitioner's arguments. It pointed out that 11 U.S.C. § 502 requires courts to determine the amount of claims and to allow them unless they are precluded by a specific exception in § 502(b). The bankruptcy court found no such exception and deemed § 506 irrelevant because it deals with secured claims. Therefore, the bankruptcy court allowed F&D's claim for attorneys' fees. Pet. App. at 30a–37a. The district court reached the same conclusion, also relying on this Court's guidance in *Travelers*. *Id.* at 17a–21a.

II. The Second Circuit's Decision

The Second Circuit affirmed. The court applied the framework set forth in *Travelers* and concluded the initially contingent nature of F&D's claim did not foreclose recovery.

First, the Second Circuit determined that, "under *Travelers*, section 502(b) interposes no bar to an unsecured creditor's ability to recover post-petition fees." Pet. App. at 9a. It applied this Court's principle that, "[u]nless a claim is unenforceable under state law or one of the section 502(b)(2)–(9) exceptions applies, courts must 'presume' that the claim 'will be allowed in bankruptcy unless [it is] expressly disallowed'" elsewhere in the Code. Pet. App. at 9a (quoting *Travelers*, 549 U.S. at 452). The court concluded that the § 502(b) requirement that the amount of a claim be determined "as of the date of the filing of the petition" did not bar recovery because *Travelers* dealt with a claim for post-petition

attorneys' fees and did not identify that provision as a bar. *Id.* at 10a.

Next, the court addressed Petitioner's argument that 11 U.S.C. § 506(b) (2006) implicitly prevents an unsecured creditor from recovering fees because it specifically permits an oversecured creditor to recover "reasonable fees" as part of a secured claim. Pet. App. at 11a. The court relied on *Travelers*' command that fees may only be disallowed based on an express prohibition in the Code. *Id.* at 11a–12a. Section 506(b) does not expressly disallow unsecured claims for post-petition attorneys' fees, and therefore does not preclude recovery. *Id.*

The Second Circuit then distinguished *United Savings Association v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365 (1988) ("*Timbers*"). *Timbers*, the court explained, addressed interest, not fees. Section 502(b)(2) contains an express rule disallowing unmatured interest, and § 506(b) provides an exception that permits oversecured creditors to recover post-petition interest to the extent of their security. The Code contains no similar rule prohibiting claims for post-petition attorneys' fees.

The court later rejected Petitioner's argument predicated on § 502(e)(2), which provides that contingent claims for reimbursement or contribution should be allowed or disallowed "the same as if such claim had become fixed" prepetition. 11 U.S.C. § 502(e)(2). The court concluded Petitioner cannot invoke *expressio unius* in the face of *Travelers*' admonition that enforceable claims are presumed allowed in bankruptcy "unless they are *expressly* disallowed" under the Code. Pet. App.

at 13a (quoting *Travelers*, 549 U.S. at 452) (emphasis added).

Finally, the court dispatched of Petitioner's policy arguments. It emphasized the importance of honoring "bargained-for terms" in a valid contract over concerns for equitable distribution. Finding no legal bar to recovery, the court allowed F&D's claim.

REASONS FOR DENYING THE PETITION

The petition does not identify an issue warranting review. Since this Court's decision in *Travelers*, only two courts of appeals have considered the status of claims for post-petition attorneys' fees, and both reached the same conclusion—the Bankruptcy Code permits these fees. Moreover, both decisions rest securely on the framework laid out by this Court in *Travelers*.

This Court required claims for attorneys' fees to be allowed unless expressly disallowed under the Bankruptcy Code. The Code does not expressly prohibit unsecured prepetition claims for post-petition attorneys' fees. Contrary arguments based on implied disallowances are inconsistent with the logic of *Travelers*.

I. THE DECISION BELOW DOES NOT CONFLICT WITH RELEVANT OPINIONS FROM ANY OTHER CIRCUIT OR THIS COURT.

Petitioner seeks *certiorari* to address a defunct conflict that this Court effectively resolved in *Travelers*.

A. This Court's Decision in *Travelers* Substantially Clarified The Law on Claims for Attorneys' Fees.

In *Travelers*, this Court overturned a Ninth Circuit rule that treated certain post-petition attorneys' fees in bankruptcy differently from other unsecured claims. This Court insisted that attorneys' fees are governed by the existing framework of § 502. The Court reserved consideration of the interrelationship between §§ 502 and 506(b), as that issue had not been properly raised before the lower courts. *See* 549 U.S. at 456. However, the Court instructed that attorneys' fees must be allowed unless expressly disallowed by the Code. *Id.* at 452. The framework established in *Travelers* guides any inquiry concerning attorneys' fees and directs the result.

First, under *Travelers*, a claim for attorneys' fees is treated the same as any other kind of claim. While the American Rule typically requires parties in litigation to pay their own attorneys' fees, this rule can be overcome by operation of a statute or a contract. *Travelers*, 549 U.S. at 448–49. Like any other contract, a contract allocating attorneys' fees, if enforceable under nonbankruptcy law, is "allowable in bankruptcy except where the Bankruptcy Code provides otherwise." *Id.* at 448. The question, then, is whether the Bankruptcy Code disallows unsecured claims arising from prepetition contracts for post-petition attorneys' fees.

Section 502 governs whether a claim is allowed or disallowed. 549 U.S. at 449 (citing 11 U.S.C. § 502). If a party objects to a claim, § 502 provides, "the court 'shall allow' the claim 'except to the extent that'

the claim implicates any of the nine exceptions enumerated in § 502(b)." *Id.* (citing 11 U.S.C. § 502(b)). Eight of the nine exceptions, § 502(b)(2)–(9), have no relation to a creditor's claim for attorneys' fees. *Id.* Thus, a creditor's claim for attorneys' fees "must be allowed under § 502(b) unless it is unenforceable within the meaning of § 502(b)(1)." *Id.* at 450. A claim is unenforceable within the meaning of § 502(b)(1) only if a substantive defense, available outside of bankruptcy, applies. *Id.* As Petitioner concedes, no such defense applies here.

If, on the other hand, a claim is enforceable under nonbankruptcy law, it "will be allowed in bankruptcy unless [it is] *expressly disallowed*" by a provision of the Bankruptcy Code. *Id.* at 452 (emphasis added). Failure to identify textual support in the Code is "fatal" to a purported disallowance. *See id.* Therefore, the final question under the *Travelers* framework is whether another provision in the Code "'clearly and expressly'" compels disallowance. *See id.* (quoting *FCC v. NextWave Personal Commc'ns Inc.*, 537 U.S. 293, 302 (2003)).

With respect to the present case, this last query is the only question left unanswered by *Travelers*. The Code has no provision, however, that "clearly and expressly" disallows unsecured claims arising from prepetition contracts for post-petition attorneys' fees. Thus, *Travelers*' has led to a consensus that the Code allows these types of claims.

B. Post-*Travelers* Decisions Do Not Demonstrate a Live Conflict.

Petitioner cannot cite to a live conflict between the courts of appeals. Only two circuits have considered this issue and both applied the *Travelers* framework to hold that the Bankruptcy Code does not bar unsecured claims for post-petition attorneys' fees authorized by a valid prepetition contract.

Other than the Second Circuit, the only other court of appeals that has considered unsecured claims for attorneys' fees after *Travelers* is the Ninth Circuit in *In re SNTL Corp.*, 571 F.3d 826 (9th Cir. 2009) (adopting the opinion of the Bankruptcy Appellate Panel, at 380 B.R. 204 (B.A.P. 9th Cir. 2007)). In that case, just as the present case, the court followed the *Travelers* framework and concluded the Code does not specifically disallow such fees.

A myriad of lower courts have issued decisions since *Travelers*, a clear majority of which follow the *Travelers* framework and allow unsecured claims for post-petition fees. *See, e.g., In re Busch*, 369 B.R. 614, 625 (B.A.P. 10th Cir. 2007) (applying *Travelers* to a claim for attorney's fees allocated by state statute); *In re Marks*, 394 B.R. 198, 206 (Bankr. N.D. Ill. 2008) (concluding that unless § 506(b) applies, parties may only recover attorney's fees based on their contract); *In re Qmect, Inc.*, 368 B.R. 882, 886 (Bankr. N.D. Cal. 2007) (unsecured creditor was entitled to include in its claim contract-based attorneys' fees incurred post-petition). In decisions where lower courts have disallowed unsecured claims for attorneys' fees, the opinions either fail to cite *Travelers* or simply ignore the guidance it

provides. *See, e.g., In re Elec. Mach. Enters.*, 371 B.R. 549, 552 (Bankr. M.D. Fla. 2007) (acknowledging, but failing to discuss, the *Travelers* decision).[1]

Travelers has had a decisive impact on the law. There is no current conflict among post-*Travelers* appellate decisions and *Travelers* continues to shape lower courts' perceptions. Accordingly, there is no need for this Court to take up this issue at this time.

C. Pre-*Travelers* decisions do not provide sufficient justification to merit this Court's review.

Unable to demonstrate a live conflict, Petitioner tries to capitalize on an ostensible Circuit conflict that preceded *Travelers*. Petitioner cites two facially adverse appellate decisions rendered before *Travelers*, but only one Circuit opinion. Pet. at 6. These decisions do not establish any Circuit conflict.

Petitioner first cites *Adams v. Zimmerman*, 73 F.3d 1164 (1st Cir. 1996). As Petitioner acknowledges, *see* Pet. at 6 n.1, *Adams* involved banking law—not the Bankruptcy Code—and, in the context of drawing an analogy, simply remarked on recovery of attorneys' fees in bankruptcy. *Adams*, 73 F.3d at 1177. This hardly demonstrates a split of authority.

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[1] Petitioner cites several law review articles predicting treatment of attorneys' fees in the post-*Travelers* world. Pet. at 10. All of these articles preceded the two post-*Travelers* decisions in the courts of appeals.

Further, *Adams* is significantly undercut by a post-*Travelers* decision of the First Circuit. *In re Gencarelli*, 501 F.3d 1 (1st Cir. 2007). There the court addressed whether the reasonableness requirement of § 506(b) limited a creditor's right to recover on a contractual prepayment penalty from a solvent debtor. *Id.* According to the court, the case "turn[ed] on the interrelationship between sections 502 and 506(b) of the Code." 501 F.3d at 4. It agreed with the creditor that "whereas section 506 furnishes a series of useful rules for determining whether and to what extent a claim is secured (and, therefore, entitled to priority), it does not answer the materially different question of whether the claim itself should be allowed or disallowed." *Id.* at 5. Although, in *Gencarelli*, the First Circuit found "no principled basis for treating attorneys' fees differently from prepayment penalties in this context," *id.* at 6 n.1, it left open the question of attorneys' fees for a future case. Nonetheless, its rationale contradicted the dictum in *Adams* and, at a minimum, proved the issue remains open in that circuit.

The other pre-*Travelers* appellate opinion cited by Petitioner is *In re Waterman*, 248 B.R. 567 (B.A.P. 8th Cir. 2000). *Waterman* is not a Circuit decision at all, but the views of a bankruptcy appellate panel, equivalent to a district court hearing bankruptcy appeals.[2] The *Waterman* panel unremarkably

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[2] A bankruptcy court decision may be appealed either to a district court or a bankruptcy appellate panel. Fed. R. Bankr. P. 8001–20. A party appeals an adverse bankruptcy appellate panel decision to a court of appeals. Fed. R. App. P. 6.

allowed an oversecured creditor to recover post-petition attorneys' fees under § 506(b), but offered the comment that "generally, a creditor's claim is determined as of the date of the filing of the bankruptcy petition and . . . amounts incurred post-petition are not usually permitted as part of the claim[.]" *Id.* (citing *In re Henry*, 183 B.R. 748, 750–51 (Bankr. N.D. Tex. 1995)). This comment is dictum and the case relied on for this proposition does not address attorneys' fees and does not analyze or even cite to §§ 502 or 506. *See In re Henry*, 183 B.R. at 748–51. The Eighth Circuit itself has not addressed the issue, either before or after *Travelers*.

With the overruling of the Ninth Circuit rule in *Travelers*, the undermining of the First Circuit comment by *Gencarelli*, and the absence of an on-point holding by the Eighth Circuit, any conflict has dissipated. In addition, the Second and Ninth Circuits are consistent with other circuits that, even prior to *Travelers*, indicated their willingness to allow post-petition attorneys' fees. *See In re Dow Corning Corp.*, 456 F.3d 668, 680–86 (6th Cir. 2006); *In re Welzel*, 275 F.3d 1308, 1318–20 (11th Cir. 2001).

With no actual inter-circuit conflict, the Petitioner urges that the Second Circuit's decision conflicts with this Court's opinion in *Randolph v. Scruggs*, 190 U.S. 533 (1903). This 100 year-old case does not address the key provisions of the Bankruptcy Code on which the present case turns; indeed, it was decided 75 years before the Code was enacted. In addition, *Randolph* addresses an administrative expense obligation arising from a voided assignment, whereas F&D asserts a general

unsecured claim. Petitioner cannot create a conflict by reaching back more than 100 years to an entirely different statute.

II. THE DECISIONS BELOW ARE CORRECT.

Review by this Court is also unnecessary because each of the courts below reached the right conclusion based on the framework provided in *Travelers*. As recognized in *In re SNTL Corp.*, 571 F.3d at 840–41, opponents of unsecured claims for attorneys' fees incurred post-petition commonly assert four arguments. Each of these arguments has been considered and properly rejected by both the Ninth and Second Circuits.

A. Section 506(b) does not preclude unsecured claims for attorneys' fees.

Petitioner asserts that the Second Circuit's decision renders § 506(b) superfluous. This is merely a renovation of their earlier argument that, because § 506(b) expressly permits an oversecured creditor to recover "reasonable fees," the Code's silence with respect to unsecured creditors means that they may not recover any fees. This argument fails under the structure of the Code as interpreted in light of the *Travelers* framework.

Section 506 does not disallow unsecured claims because it does not address them. Section 506 is entitled "Determination of secured status." As explained by the Bankruptcy Court, it "is not concerned with the question of claim *allowance*. . . . [but] the '[d]etermination of secured status' and what may be included in a secured claim." Pet. App. at 36a (citing *In re SNTL Corp.*, 380 B.R. at 220). If Congress had intended to

disallow unsecured claims, the more natural location would have been § 502, entitled "Allowance of claims or interests." *See In re SNTL Corp.*, 571 F.3d at 842–43.

Section 506(b) does not address unsecured claims at all, let alone whether or not unsecured claims for attorneys' fees are allowed. Because it does not "clearly and expressly" compel disallowance, these fees are allowed. *See Travelers*, 549 U.S. at 452 ("claims enforceable under applicable state law will be allowed in bankruptcy unless they are expressly disallowed").

B. The Code permits contingent prepetition claims.

Petitioner urges that post-petition fees should not be allowed because of § 502(b)'s requirement that the amount of a claim be fixed as of the filing date of the petition. This argument is unavailing. The statute requires that claims be valued as of the petition date, not that post-petition events be entirely disregarded. Courts routinely consider post-petition events affecting the value of an unsecured claim, such as the outcome of litigation for claims that are the subject of ongoing adversary proceedings. *See* 6 Alan N. Resnick & Henry J. Sommer, *Collier Bankruptcy Practice Guide* ¶ 92.07[2], 92-15–92-17 (2009) ("Because the Bankruptcy Code permits the bankruptcy court to adjudicate all sorts of disputed, contingent and unliquidated claims, the proponent of a [Chapter 11 reorganization] plan must reserve and find a mechanism for distribution to such claimants.") (footnote omitted). Moreover, the Code expressly defines "claim" to include contingent claims, 11 U.S.C. § 101(5), and courts regularly

determine the value of those claims based on subsequent events, *see* Resnick & Sommer, *supra*, ¶ 92.07[2].

Thus, if the creditor's right to collect arose prepetition, "the fact that the fees were actually incurred during the post-petition period is not relevant to the determination of whether the creditor has an allowable prepetition claim for the fees." Pet. App. at 39a (citation omitted). This comports with the Code's definition of claim which specifically includes "contingent" rights to payment. 11 U.S.C. § 101(5) (2006). Petitioner's position reads contingent claims out of the Code and renders § 502(c)—which permits courts to estimate the value of contingent claims—inutile.

Petitioner accuses the Second Circuit of rendering §§ 502(e)(2), (g), (h), and (i) "superfluous" by describing a prepetition obligation that becomes fixed post-petition as an allowable "contingent claim." Pet. at 11–12. These subsections, however, each serve their own unrelated purposes. They do not, as Petitioner suggests, dictate whether claims that arise post-petition should be allowed or disallowed, but rather cross-reference to other sections of the Code (including § 502(b)) for such determinations. The only common aspect between them is that they impose prepetition status on various types of claims that are not fixed at the moment of filing, as would typically be the case under § 502(b).

Subsection 502(e) addresses claims for reimbursement and contribution when a creditor is liable with the debtor to another party. Section 502(e)(1) disallows such claims to the extent

they are contingent, while § 502(e)(2) permits them once they become fixed and provides that they will be deemed prepetition claims upon allowance. Since F&D's claim for attorneys' fees is a direct claim against the bankruptcy estate, this provision is not applicable.

Subsection 502(g) governs the treatment of a contract claim after the contract has been rejected and provides that it will be treated as a prepetition claim. Subsection 502(h) deals with another kind of post-petition event: it provides that allowed claims arising from recovery of property by the trustee should be treated the same as if the claim had arisen before the filing date of the bankruptcy petition. Finally, § 502(i) accords prepetition status to a tax claim entitled to priority under § 507(a)(8), regardless of when the tax became payable.

These exceptions require prepetition status for certain claims when they are not fixed until after the petition date. The prepetition status of F&D's claim for attorneys' fees, however, is not in question. For that reason, the Second Circuit's allowance of F&D's prepetition claim for post-petition attorneys' fees as a contingent claim does not affect any of the cited subsections, let alone render them superfluous.

C. Petitioner's remaining arguments are unavailing.

Petitioner's two remaining arguments do not warrant much discussion. As the Second Circuit clarified, this Court's decision in *Timbers*, 484 U.S. 365, addresses the express prohibition on "unmatured *interest*" in § 502(b)(2), and finds that § 506(b) provides an exception for oversecured

creditors to the extent of their security. 484 U.S. at 373–74. As such, *Timbers* is inapposite.

Finally, the countervailing policy arguments have negligible import in light of the Code's clarity and this Court's guidance in *Travelers*.

III. THIS COURT'S INTERVENTION IS UNNECESSARY.

Petitioner envisions that, without another decision on attorneys' fees from this Court, forum-shopping will ensue. Pet. at 9–10. The petition presents no evidence, however, to support this fear. In fact, forum shopping is very unlikely. All circuits that have addressed this issue after *Travelers* are in conformity. Indeed, as noted above, no circuit court has a holding to the contrary. Moreover, a debtor is unlikely to select a forum just to avoid a general unsecured claim for fees. Fees are likely to be less than primary liabilities, and general unsecured claims often receive only cents on the dollar. It would not make sense to select a forum on this basis.

This petition does not present either a risk of forum-shopping or a live conflict for review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

CHARLES G. COLE
Counsel of Record
FILIBERTO AGUSTI
LINDA C. BAILEY
STEPTOE & JOHNSON LLP
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-6270

Attorneys for Respondent Fidelity & Deposit Co. of Maryland

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